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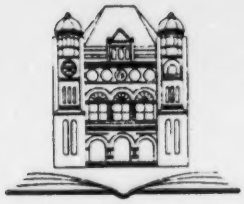

Backgrounder # 41
July 2000
ISSN 1206-1514
ISBN 0-7778-9934-5

RECENT DEVELOPMENTS IN TOBACCO LITIGATION

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INTRODUCTION

On March 1, 2000, the Ontario government launched a $40 billion (U.S.) lawsuit in a New York Federal Court against the major tobacco manufacturers to recover costs incurred by the Ontario Health Insurance Plan (OHIP) in the treatment of smoking-related diseases. This paper situates this claim in the context of other litigation against tobacco companies launched by both governments and individuals around the world.

Lawsuit Launched by Government of Ontario

The suit, which was begun under the *Racketeer Influenced and Corrupt Organisations Act (RICO)*, alleges that the cigarette manufacturers Imperial Tobacco, Philip Morris Companies Inc., and R.J. Reynolds Tobacco Holdings have "participated in an international conspiracy to ensure a market for their hazardous products." In addition, the suit alleges that they have hidden information about the addictive nature of nicotine.[1]

The South Carolina law firm of Ness, Motley, which represented more than 25 states in U.S. tobacco litigation,[2] was retained on a twenty- percent contingency fee basis to bring the claim. Therefore, if the claim results in a payment of $40 billion, the firm will collect fees of $8 billion U.S. from the Ontario government.

Guatemalan Test Case

Ness, Motley did not file suit immediately after Minister Witmer's announcement because a decision was pending in a lawsuit launched by the Guatemalan government against the tobacco manufacturers in the U.S. federal court.[3] This lawsuit was a consolidation of a number of claims brought by the governments of Panama, Columbia and Bolivia. On December 30, 1999, Justice Friedman dismissed the action, determining that Guatemala should have brought its claim before its own courts. The decision has been appealed. If the appeal is unsuccessful, one commentator involved in Canadian tobacco litigation has suggested that the case would effectively bar Ontario and other foreign governments from using U.S. courts to recover tobacco-related health care costs.[4]

Response of the Ontario Government

After the Guatemalan case was dismissed, the Ontario government introduced legislation which it is suggested will help distinguish the Ontario claim from the Guatemalan one.[5] This legislation, amending the *Health Insurance Act,* allows the Ontario government an independent cause of action for the recovery of OHIP expenses incurred as the result of negligence.[6]

The lawsuit could potentially result in a major financial windfall for the Ontario government because of the availability of higher damages awards in the U.S. On the other hand, the disadvantage of pursuing the lawsuit in the U.S. rather than in Ontario is that "limitation periods" (i.e. the time within which a lawsuit must be started after an event) might expire.[7] As a result, if the U.S. claim were unsuccessful, the Ontario government would be precluded from making a similar attempt in an Ontario Court.

Further, law professor Richard Daynard of Boston's Northeastern University, who heads the Tobacco Product Liability Project supporting such cases, is pessimistic about the impact of the Guatemalan ruling on Ontario's chances. He commented that the lawsuit should have been launched in Canada after an unfavourable decision was rendered by the U.S. Appeals Court of the 2nd Circuit in April 1999. This decision dismissed a similar lawsuit filed by a union health and benefit fund. The fund pays out long-term disability, death and other benefits to workers. The Court concluded that the fund's damages were too remote from the actions taken by the tobacco companies to warrant a claim.[8]

Cynthia Callard, executive director of Physicians for a Smoke-Free Canada, commented that rather than focussing on monetary compensation, the Ontario government should include concessions about the way manufacturers sell and market cigarettes in any court settlement.[9] For example, research has demonstrated that young people are more likely to respond to warnings about the detrimental effects of smoking on their personal appearance rather than information about the health consequences. Therefore, Physicians for a Smoke-Free Canada advocates that warnings on cigarette packaging target particular age groups.[10] Robert Parker, president of one of the defendants in the lawsuit, the Canadian Tobacco Manufacturers Council, indicated that the province of Ontario already reaped $750 million in annual tobacco tax revenues; if the government wanted more money, it should simply further raise taxes.[11]

Another commentator has suggested that if Canadians accept the notion of individual responsibility, governments should force smokers to pay higher health care premiums.[12]

Lawsuit launched by the Government of Canada

In December 1999 the federal government filed a $1 billion civil fraud lawsuit against R.J.R. MacDonald and the Canadian Tobacco Manufacturers Council in Syracuse, New York. The lawsuit alleges that the company deliberately conspired to smuggle cigarettes into Canada, with the result that the federal government was defrauded of more than $1 billion U.S. in foregone taxes, duties and other costs from 1991 to 1994. This is the first time a foreign government has used the civil provisions of the racketeer law to target a tobacco company for alleged smuggling.

Less than four months after the suit was launched, an *Access to Information Act* request revealed that the Government of Canada had already paid $3.76 million in legal fees to the Chicago law firm Barlit Beck Herman Palenchar & Scott. The government has also dedicated a five-lawyer in-house legal team to the tobacco smuggling litigation; it is estimated that the case will take a minimum of two years and perhaps longer to go to trial.[13]

On July 4, 2000 a New York District Court judge dismissed the suit on the basis that it contravened the "Revenue Rule" of U.S. tax law, which provides that the executive and legislative branches of the U.S. federal government are better able to deal with foreign relations than is the judicial branch. Therefore, U.S. courts should not adjudicate over foreign tax matters. The judge also found that the Government of Canada had failed to adequately explain the commercial injury the country had suffered as a result of increased

tobacco consumption. A lawyer with the Department of Justice told the press that the "Revenue Rule" had previously been legally challenged and that after analysing the decision, the government would decide whether to pursue the litigation.[14]

Lawsuit Launched by Private Individuals in Ontario

Class action

A class action brought by individual smokers against R.J.R. MacDonald, Imperial Tobacco, Rothmans, and Benson & Hedges was certified as a class action in June 1997.[15] This litigation is now proceeding through the courts.[16]

Individual Suit

In early April 2000, a Small Claims Court judge decided against Imperial Tobacco in its attempt to have a lawsuit dismissed. A Toronto paralegal, Joseph Battaglia, began smoking in 1957 when he got a job at Rothman's. He eventually became national sales manager for a Rothman's label. In 1997, he learned of the litigation between the American states and the tobacco companies. His lawsuit alleges that Imperial Tobacco deliberately designs their Matinee Extra Mild King Size and Matinee Extra Mild Super Slims, "low tar" cigarettes, in a manner that results in the delivery of more toxic tar and addictive nicotine.[17]

Mr. Battaglia has retained Toronto lawyer Douglas Lennox to represent him on a *pro bono* basis. Mr. Lennox has written to Imperial Tobacco on his client's behalf offering to settle the dispute out of court if the firm pays Mr. Battaglia $1 and admits that it misled the public about the impact of "low tar" cigarettes. The company has not responded to the offer.[18]

Barry Swadron, a Toronto civil litigator, commented that "this is the thin edge of the wedge. It is about time that cigarette firms be held accountable for their actions in Canada, as they have been in the United States."[19]

British Columbia Legislation

The first Canadian government to sue tobacco manufacturers was the B.C. provincial government.

The B.C. government passed the *Tobacco Damages and Health Care Costs Recovery Act*[20] in 1997 and launched a lawsuit against Imperial Tobacco Ltd., Rothmans, Benson & Hedges Inc. and R.J.R. Macdonald Inc., their parent companies and affiliated U.S. companies whose products are sold in B.C.

Like the Ontario amendments referred to above, the legislation permitted a direct action for the recovery of the cost of health care benefits incurred on behalf of individuals or groups covered by B.C. health insurance. However, the statute went further than the Ontario amendments by providing that if it were established that a tobacco company had breached its duty towards a smoker or group of smokers and that these individuals had

been exposed to tobacco, the Court was required to presume that the tobacco exposure had contributed to disease. Therefore, the legislation removed the requirement that a plaintiff must usually fulfil in civil litigation to prove a connection between the defendant's action and the plaintiff's loss. The tobacco companies challenged the constitutional validity of the legislation, arguing that this constituted "a radical departure from traditional common law damage actions requiring proof of individual causation and damages."[21]

Extra-Territoriality

In a decision rendered in March 2000, the B.C. Supreme Court rejected most of these arguments, although it did strike down the legislation on the basis that its scope was excessively broad, since it affected corporations which were not headquartered in B.C.[22] The Court concluded that this rendered the legislation beyond the province's powers and therefore unconstitutional.

Interference with the Independence of the Judiciary

The manufacturers argued that the notion of a group, or "aggregate action," for recovery of health care costs constituted an interference with the principle of judicial independence, since it did not permit the Court to hear from individual witnesses and to receive necessary evidence in order to make a factual determination. Justice Holmes disagreed with this argument.[23] He did not believe that the inability to identify insured individuals made it impossible for the tobacco manufacturers to defend themselves.

The Rule of Law

The Court also rejected the tobacco manufacturers' arguments that the legislation treated them unfairly compared to other product manufacturers, who were not subject to the same presumptions described above in product liability litigation.

Comparison with Florida Legislation

The Court noted that the legislation was based on the state of Florida's *Medicaid Third-Party Liability Act*.[24] A court challenge to the validity of this legislation was upheld on the basis that the state "must have the freedom to craft causes of action to meet society's changing needs."[25]

Aftermath of the Court Case

An editorial in the *National Post* criticised the B.C. Supreme Court, adopting the view that the decision would make B.C. "the first English-speaking jurisdiction to legalise show trials where verdicts are known in advance."[26]

On May 15, 2000, the B.C. government introduced Bill 15, the *Tobacco Damages and Health Care Costs Recovery Act*, in which it eliminated the section of the legislation struck down by the courts permitting the government to sue companies outside of provincial jurisdiction. The government also announced that it planned to launch a new lawsuit.[27]

Newfoundland Lawsuit

In May 2000 the government of Newfoundland and Labrador announced that it was proceeding with legislative changes enabling it to sue the tobacco industry. Legislation has been drafted which the government hopes will be passed in the fall of 2000. The governments of Newfoundland and Labrador and B.C. have been co-operating in research and legislative drafting.

Possible Québec Lawsuit

The media has reported that Québec is considering legal action.[28] On July 17, 2000 the province will embark upon a new initiative to fight cigarette smoking among teenagers. An advertising campaign has already been launched aimed at 11-13 year-olds. The number of inspectors investigating complaints concerning retailers selling to underage consumers will double, and a law will be enacted allowing the attorney-general to designate local inspectors to issue tickets to underage smokers.[29]

Introduction of Federal Legislation Raising Cigarette Costs

If it becomes law, Bill S-20, the *Tobacco Youth Protection Act*, introduced by Senator Colin Kenny, will increase the price of a pack of cigarettes by 19 cents. The money raised – estimated at $360 million annually, will be allocated to a foundation undertaking antismoking initiatives. When similar legislation was introduced two years ago, the major tobacco manufacturers opposed the initiative. In June 2000, the Senate, on three separate occasions, invited tobacco industry executives to appear before a Senate Committee studying the legislation; these invitations were ignored. As a result, they had to be legally compelled to testify.

The executives, Bob Bexon, President & C.E.O. of Imperial Tobacco, Michel Poirier, President & C.E.O. of JTI Macdonald and John Barnett, President & C.E.O. of Rothmans, Benson & Hedges, which together manufacture 98 percent of the cigarettes in Canada (Imperial holds 70 percent of the Canadian market), surprised some observers by indicating that they supported the bill; further, they recommended toughening it to prohibit children under 18 from possessing cigarettes. They also admitted that cigarettes were addictive and that they caused diseases such as cancer. These admissions were believed to be the first such public statements by Canadian tobacco executives, although their U.S. counterparts had previously made similar comments.[30]

These admissions may have been influenced by the federal government's release of records found in Guildford, England, where British American Tobacco, the parent company of Imperial Tobacco, stores its files. These records were released as part of tobacco litigation in the U.S. The records revealed that in October 1962 six Canadian tobacco firms reached an agreement to hide information from the public about tar and nicotine in cigarettes. The six companies were Imperial Tobacco, Rothmans, Macdonald Tobacco, Tuckett Tobacco, Rock City Tobacco, and Trans-Canada Tobacco (the latter three companies no longer exist). The signatories agreed to the following:

- There had been wide publicity about studies indicating "an association between smoking and lung cancer" (on March 7, 1962, Britain's Royal College of Physicians released a report concluding that smoking caused lung cancer and bronchitis and increased the likelihood of heart disease);
- The conclusions reached in these studies were based on statistical data;
- No cause and effect relationship had been found between smoking and disease either through laboratory or clinical studies;
- Research was being pursued on an intensified scale to determine the true facts about smoking;
- Any public claim about the use of data concerning tar or nicotine might be misleading to the consumer and thus contrary to the public interest.[31]

The industry began warning consumers on a voluntary basis about tar and nicotine levels in October 1975.

Tightening of Federal Advertising Regulations

On June 8, 2000 the House of Commons unanimously passed new regulations forcing tobacco companies to print warning pictures such as blackened teeth and a close-up photograph of a tumour on cigarette packages. The Vice-President of Communications for the Canadian Tobacco Manufacturers Council, Marie-Josée Lapointe, indicated that the Council was considering a court challenge to the packaging regulations. The industry wanted 18 months to comply with the new law, but the government indicated that it wished to see the new packaging in six months.

Reduction in Nicotine Levels

The House of Commons Standing Committee on Health has ordered Health Canada to undertake a study on the introduction of a ten-year timetable for reducing nicotine levels in cigarettes.[32]

Tobacco Litigation in the U.S.

Prior to 1994, the U.S. Food and Drug Administration (FDA) did not consider cigarettes to be a consumer product over which it had regulatory responsibility. However, after a series of explosive revelations from tobacco industry "whistle-blowers" to the effect that cigarette manufacturers were "spiking" the nicotine content of cigarettes to enhance addiction, state governments began launching legal actions against tobacco companies in order to recover the medical costs of treating tobacco-related illness.

This litigation reached a conclusion four years later when a Master Settlement Agreement was signed by eight state Attorneys General and the tobacco companies on November 20, 1998. Shortly afterwards, thirty-two remaining attorneys general ratified the agreement,[33] which provided that the tobacco companies would pay the plaintiffs $206 billion; in exchange, the states were prohibited from suing to recover the costs of treating

ill smokers. However, the terms of the settlement did not preclude lawsuits undertaken by individuals as well as "class actions" against tobacco companies. Last year two jury verdicts against manufacturer Philip Morris imposed a total of $57 million in "punitive" damages (that is, payments which must be made over and above the amount set by the Court to compensate for the actual loss). Recently, a lawyer for 500,000 sick smokers asked a jury to make the highest punitive damages award in U.S. history against Philip Morris - $154 billion.[34]

The Governments of Canada and British Columbia have retained Jeffrey Wigand as a consultant in their litigation against the U.S. tobacco manufacturers. Dr. Wigand rose to U.S. national prominence when he became the tobacco industry's highest-ranking "whistle blower;" he had previously been employed as Vice-President for Research and Development for Browne & Williamson Tobacco Corporation. In 1995 he gave an interview to the programme "60 minutes" and also a deposition as part of the litigation brought by the states attorneys general against the tobacco companies. Since leaving the tobacco industry, Dr. Wigand formed a non-profit organisation that discourages teen tobacco use: "Smoke-Free Kids, Inc."[35]

Australian Tobacco Litigation

In 1991 the Federal Court ruled that advertisements run in 1986 by the Tobacco Institute of Australia denying adverse health effects from environmental tobacco smoke violated the *Trade Practices Act* (1974), which prohibits misleading or deceptive conduct in trade or commerce.

A class action against the major Australian tobacco companies was started in the Federal Court of Australia on behalf of individuals who had suffered loss from smoking-related disease. In August 1999 the Federal Court refused a request brought by the defendants to dismiss the class action proceedings, and indicated that the case would be tried this year. A second class action was filed in the Federal Court by public health and medical organisations in September 1999 seeking reimbursement of money spent on tobacco control since 1992.[36]

U.K. Tobacco Litigation

In March 1999 a class action started by 54 people with lung cancer was thrown out by the Courts when a judge decided not to extend the three year statute of limitations for 28 of the claimants. The judge commented that the prospects of success for the remaining ones were "by no means self-evident." The Legal Aid Board does not finance tobacco litigation, with the result that lawyers must proceed on a contingency fee basis (i.e. they will be paid out of the proceeds of the lawsuit). Another factor discouraging litigation is that, as in Canada, but in contrast to the U.S., if a tobacco company wins, the plaintiff must reimburse the company's costs. The possibility of a significant financial penalty is a severe disincentive to take legal action. Further, there are few prospects of large punitive damages against tobacco companies if the action is successful. A successful case in the U.K. would result in a $160,000 award, in contrast to the awards made by juries in the U.S. which have amounted to tens of millions of dollars.

On the other hand, much higher tobacco taxes in the U.K. exceed the per smoker value of the U.S. master agreement between the industry and the states by a factor of eight. Thus, it could be argued that the success of tobacco litigation in the U.S. is a response to the failure of the legislative and executive branches of government to regulate the tobacco industry.[37]

NOTES

[1] Richard Foot, "Ontario tobacco lawsuit filed in New York court: Unlikely it will be heard," *National Post*, 3 March 2000, p. A8. The suit also names the Canadian Tobacco Manufacturers Council as a defendant.
[2] Internet site at http://www.nmlrp.com accessed on 21 June 2000.
[3] *Guatemala* v. *Tobacco Institute et al*, Civil Action No. 98-1185, Paul Friedman, United States District Judge, 30 December 1999. Internet site at http://www.tobacco.neu.edu accessed on 21 June 2000.
[4] Douglas Lennox, "Ontario's Tobacco Litigation Raises Concerns," *The Lawyers Weekly*, 18 February 2000, p. 13.
[5] Bill 23, the *Ministry of Health and Long-Term Care Statute Law Amendment Act, 1999*, S.O. 1999, c. 10. For links to related resources as well as background on this legislation, see the Legislative Library's "Bills Before the House." Intranet site at http://www.ola.org/library/libscripts/qry1_3.asp?billno=23&sess=371.
[6] Ibid., ss. 1 and 2.
[7] Douglas Lennox, "Ontario's Tobacco Litigation Raises Concerns," *The Lawyers Weekly*, 18 February 2000, p. 13.
[8] Tom Blackwell, "Tobacco suit faces hurdles: Province should have sued in Ontario court, U.S. expert says," *Ottawa Citizen*, 7 March 2000, p. A5.
[9] Richard Foot, *supra* note 1.
[10] See "Package Warning Labels" on the website of Physicians for a Smoke-Free Canada. Internet site at http://www.smoke-free.ca/pdf_1/part11.pdf accessed on 11 July 2000. The Government of Ontario acknowledges the importance of strengthening restrictions concerning sales to minors under the *Tobacco Control Act* in a press release announcing the litigation on April 23, 2000.
[11] Ibid. An editorial in the *Toronto Star* suggested that annual tobacco tax revenues were $477 million: "Smoke and Lawyers," *Toronto Star*, 29 April 1999, p. A24.
[12] Barbara Yaffe, "Tobacco firms change tactics: New CEOs hope to rehabilitate their image and gain credibility," *Windsor Star*, 20 June 2000, p. A9.
[13] Cristin Schmitz, "Tobacco lawsuit racks up record tab: $3.76 million is 'tip of the iceberg' in Canada's legal fight in U.S.," *Ottawa Citizen*, 23 May 2000, p. A1.
[14] Mark Mackinnon, "1-billion tobacco lawsuit thrown out: Ottawa fails in U.S. bid to hit smugglers," *Globe and Mail*, 5 July 2000, p. A1; Tim Harper, "Ottawa lawsuit tossed out by court in U.S.," *Toronto Star*, 5 July 2000, p. A2.
[15] *Caputo et al.* v. *Imperial Tobacco Ltd.*, 148 D.L.R. (4th) 566 (Gen. Div.).
[16] The latest proceedings in May 1999 are reported in *Caputo* v. *Imperial Tobacco Ltd.*, 44 O.R. (3d) 554 (Gen. Div.).
[17] Kerry Gillespie, "Smoker battles tobacco giant; Wins right to civil suit in small claims court," *Toronto Star*, 4 April 2000.
[18] Andrew Mitrovica, "Smoker wins right to sue tobacco firms; First chance to put Canadian cigarette executives on stand, activists say," *Globe and Mail*, 3 April 2000, p. A1.
[19] Ibid.
[20] *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 1997, c. 41. The government amended the legislation the following year: see the *Tobacco Damages*

Recovery Amendment Act, S.B.C. 1998, c. 45. The legislation was further amended by the *Miscellaneous Statutes Amendment Act* (No. 3), 1999.

[21] *J.T.I. MacDonald* v. *A.G.B.C. et al*, British Columbia Supreme Court, 12 March 2000, paragraph 21. Internet site at http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/00/03/s00%2D0312.html accessed on 28 June 2000.

[22] Ibid., paragraph 222.

[23] Ibid., paragraph 66.

[24] 409.910 Fla. Stat. (1995).

[25] *Agency for Health Care Administration et al* v. *Associated Industries of Florida Inc. et al*, 678 So. 2d 1239 at 1257, Florida Supreme Court, 1996.

[26] "Courts against law," *National Post*, 23 February 2000, p. A19.

[27] Kim Lunman, "Province relaunches suit against tobacco companies; After first bid thrown out of court, B.C. again seeks billions of dollars in health care costs," *Globe and Mail*, 16 May 2000, p. A2.

[28] Ibid.

[29] Sean Gordon, "Quebec plans to take on Big Tobacco in the courts: Seeking compensation," *National Post*, 5 May 2000, p. A10.

[30] The remarks made by the executives are contained in a press release issued by the Canadian Tobacco Manufacturer's Council. Internet site at http://www.newswire.ca/releases/June2000/08/c3077.html accessed on 22 June 2000. Also see Mark Mackinnon, "Big Tobacco backs down; Admitting their product is dangerous, Canadian cigarette makers support crackdown on teen smoking," *Globe and Mail*, 9 June 2000, p. A1.

[31] Mark Kennedy, "Tobacco firms colluded to hide tar, nicotine data; Doctors dig up evidence of secret deal struck in 1962," *Ottawa Citizen*, 29 May 2000, p. A1.

[32] House of Commons Standing Committee on Health, Third Report, 12 May 2000. Internet site at http://www.parl.gc.ca/InfoComDoc/36/2/HEAL/Studies/Reports/HEALRP03-f.htm accessed on 21 June 2000.

[33] The text of the agreement may be linked to through the Internet site of the State Tobacco Information Centre. Internet site at http://www.stic.neu.edu/ accessed on 21 June 2000.

[34] Michael Connor, "Big Tobacco should pay $123B: lawyer," *National Post*, 11 July 2000, p. A1.

[35] See his biography on the Internet site at http://www.jeffreywigand.com/inside/bio.html accessed on 21 June 2000.

[36] Richard Daynard, Clive Bates, and Neil Francey, "Tobacco litigation worldwide," *British Medical Journal*, 8 January 2000, pp. 111-113. Internet site at http://www.bmj.com/cgi/content/short/320/7227/111 accessed on 21 June 2000.

[37] Ibid.